IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GRZEGORZ SMUK,	)	
	)	**Case No. 13-cv-8282**
Plaintiff,	)	
	)	**Hon. Judge Blakey**
v.	)	
	)	**Magistrate Judge Keys**
SPECIALTY FOODS GROUP, INC.,	)	
	)	**JURY DEMANDED**
	)	
Defendant.	)	

PLAINTIFF GRZEGORZ SMUK'S MEMORANDUM OF LAW IN RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT THEREFOF

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COMES NOW the Plaintiff, Grzegorz Smuk ("Plaintiff" or "Smuk"), by and through his attorneys Fuksa Khorshid, LLC and for his Memorandum of Law in Response to Defendant, Specialty Foods Group, Inc.'s ("Defendant" or "SFG") Motion for Summary Judgment and Memorandum of Law in Support (the "Motion" or "Mtn.") states as follows:

INTRODUCTION

The remaining two counts of Plaintiff's First Amended Complaint must survive summary judgment because each one makes out a clear cause of action, the most important material facts of which are subject to dispute between the parties. Defendant's Motion for Summary Judgment is an exercise in selective recitation of those facts intended to soften the impact and excuse the egregious allegations against Plaintiff's former supervisor, Tomasz Miekisz ("Miekisz"). The Court should not indulge Defendant's prettied-up version of events, by which perverse and persistent sexual harassment becomes playful roughhousing, and a victim bears more responsibility for preventing harassment than his employer. The Court should not accept an interpretation of Title VII so narrow that the mere mention of female employees in the context of harassing statements directed at Mr. Smuk means that whatever harassment took place was not gender-based. The Court should not discredit the fact that Defendant ignored Plaintiff's allegations of sexual misconduct and mistreatment when they were first reported, and only took action several years later, when allegations surfaced again and Human Resources could not look away. Defendant paints a rosy picture of its conduct, and insists that Plaintiff should have no recovery for the harms he suffered. Its position is mistaken, as matters of law and fact. Defendant's Motion for Summary Judgment must be denied.

ARGUMENT

Summary Judgment may not enter in the current circumstance because there are significant disputes over material facts that Defendant ignores or downplays in an effort to avoid liability. A fair construction of those facts adds up to sexual harassment under Title VII. To advance a claim for hostile work environment sexual harassment, an employee must demonstrate that: (1) he was subject to unwelcome harassment; (2) the harassment was based on a protected characteristic; (3) the harassment was severe and pervasive so as to alter the conditions of the employee's environment and create a hostile or abusive working environment; and (4) there is a basis for employer liability. *Mason v. So. Illinois Univ. at Carbondale*, 233 F.3d 1036, 1043 (7th Cir. 2000). Plaintiff's claims satisfy all four factors.

Smuk has pleaded and provided evidence that he was subject to unwelcome harassment from his supervisor Miekisz, that the harassment was based on his sex as a male and that it was severe and pervasive in nature, occurring on a frequent, sometimes daily, basis. SFG is liable both because Miekisz himself was Plaintiff's direct supervisor and a member of the management group, and because Plaintiff reported the harassment to the Plant Manager in 2009, but SFG took no substantive action to prevent further harassment until 2012, after a second report.

Defendant repeatedly refers to the Plaintiff's allegations of physical groping and molestation of his private parts as casual "horseplay." It ignores the fact that the Plaintiff reported regular, frequent conduct of this nature to his Plant Superintendent, Paul Sowizral ("Sowizral") in 2009, who did not even bother to report it to Human Resources. Defendant's Human Resources Manager, Maria Pagan ("Pagan"), admits that she should have been told about Mr. Smuk's 2009 report to Mr. Sowizral, and stated in her own deposition that she considers the conduct Mr. Smuk described in 2012 as "Sexual Harassment." Curiously, Defendant argues that she did not consider the behavior as such.

Defendant insists that it maintained clear guidelines about when and how employees should report sexual harassment and other improper workplace conduct, yet it did not provide such documentation to the Plaintiff in a language that he could read and understand. In addition, Defendant argues that it did not treat Mr. Smuk differently than other similarly-situated female employees, yet the evidence shows that when male SFG employees were charged with having engaged in similar, though far less severe, behavior toward female employees, those male employees were summarily fired. Plaintiff has stated causes of action for hostile work environment sexual harassment and retaliation and the matter may not properly be disposed on summary judgment.

I. Plaintiff Has Stated a Prima Facie Claim for Hostile Work Environment Sexual Harassment

a. Plaintiff's Supervisor's Conduct was Severe and Pervasive Harassment Creating a Hostile Work Environment Under Title VII

Defendant's motion is premised in large part on the idea that Mr. Miekisz's (admittedly inappropriate) conduct toward the Plaintiff was insufficiently severe or sexual in nature to support a claim for hostile workplace sexual harassment. Defendant argues that the complained-of conduct was in the nature of tasteless horseplay, citing but a handful of the numerous incidents described in the Plaintiff's Complaint and deposition testimony. The Court may not ignore Plaintiff's allegations of fact in the manner Defendant advocates.

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether a genuine issue of fact exists, the Court must view the evidence and draw all reasonable inferences in favor of the party opposing the motion. *Bennington v. Caterpillar Inc*., 275 F.3d 654, 658 (7th Cir. 2001); see also *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255 (1986). Defendant may offer a PG-13 version of Mr. Smuk's treatment, but the court is bound to consider all evidence, including Mr. Smuk's testimony of pervasive, offensive sexualized conduct, and to construe those allegations in a favorable light.

Plaintiff himself has described and testified to the following, as examples of the harassment he suffered over years of employment with SFG:

- In approximately August 2006, Miekisz approached Plaintiff from behind while he was working on an assembly line at the Chicago Plant in a bent-over position, and grabbed and squeezed his buttocks and told Plaintiff, "you have a nice ass."

- Miekisz again grabbed Plaintiff's buttocks about a month later (September 2006) and commented on how good he looked and how nice of a body he had. Plaintiff told Mikeisz not to touch him like that ever again. Miekisz's sexual assaults, physical and verbal, escalated over the next couple of months to a weekly, if not daily frequency. Each time Plaintiff told Miekisz to stop but Miekisz did not listen.

- Instead, Miekisz countered Plaintiff's rejection by ordering him to perform work that Plaintiff's co-workers were not required to do or that was otherwise outside the scope of Plaintiff's duties.

- In April 2007, after Miekisz again grabbed Plaintiff's buttocks, Plaintiff told Miekisz that "that was the last time" he would do so and that Miekisz "would regret it". Miekisz responded, "I am your boss and you can't do anything to me".

Miekisz then ordered Plaintiff to clean the basement (maintenance shop) as punishment for Plaintiff's remarks.

- In September 2007, after Plaintiff refused to allow Miekisz to grab him on the buttocks and crotch, Miekisz ordered all of Plaintiff's maintenance co-workers to clean and told them that they have Plaintiff to thank for having to do so.

- In April 2008, Plaintiff again told Miekisz not to touch him after he grabbed his buttocks and, in response, Miekisz laughed, ordered Plaintiff to go the third-floor food packing department, where the temperatures are typically around 34°F, and told him to stay there all day without going to the bathroom until there was a scheduled break.

- In March 2009, while Plaintiff was in the process of welding in the basement of the Chicago Plant, Miekisz grabbed Plaintiff's buttocks in the presence of co-workers Artur Bacik and Waldemar Basiorka. Plaintiff then pushed himself away from Miekisz but Miekisz grabbed Plaintiff, head-butted Plaintiff, and told Plaintiff, "don't touch me, because I am your boss!"

- From the time of Plaintiff's complaint to Mr. Sowizral in 2009 and continuing throughout Plaintiff's employment, Miekisz confronted Plaintiff on a daily basis and attempted to grab his crotch from the front or grabbed his buttocks while he was bending over.

- In June 2010, while Plaintiff was in the lunch room with co-worker Waldemar Basiorka, Miekisz told Plaintiff that he will "fuck [Plaintiff]".

- In April 2011, while Plaintiff was walking down the stairs at the Chicago Plant, Miekisz head-butted him and said, "you're lucky I didn't cut your head". Miekisz then told other co-workers about this incident.

- Sometime in 2011, Miekisz offered to show his testicles to Plaintiff and his co-worker, Darek Kotwica, describing the fact that he would "groom" and "moisturize" his testicles.

- In May 2012, while Plaintiff was leaning over to weld machinery, Miekisz grabbed Plaintiff's buttocks and crotch. Plaintiff told Miekisz to stop touching him and Miekisz laughed in response.

- Shortly after Plaintiff returned from vacation in early July 2012, Miekisz, in the presence of Plaintiff and other co-workers, commented on Plaintiff's wife, who at that time also worked at the Chicago Plant, stating, "your wife has boobs like my daughter!"

(Pl.'s Ex. 1 at ¶ 10; Plaintiff's Statement of Additional Material Facts ("PSMF") ¶¶14-19). Mr. Smuk testified that this sort of conduct occurred on a regular, often daily basis, and that he was the sole target of such treatment. (PSMF ¶¶ 14-19; DSMF ¶40). No other SFG employees complained of similar conduct. (DSMF ¶ 40).

Defendant points out that the standard for evaluating whether a workplace environment is hostile depends on an objective and subjective assessment of the "totality of circumstances." See *Saxton v. AT&T Co*., 10 F.3d 526, 534 (7th Cir. 1993). Hostile workplace sexual harassment is that which, practically-speaking, alters the conditions of a plaintiff's employment. See *Shepherd v. Slater Steels Corp*., 168 F.3d 998, 1008 (7th Cir. 1998). It is subject to a "reasonable" victim standard, and relies on sensitivity to the context in which the alleged behavior or behaviors occur. *Id*.

Defendant persistently ignores Plaintiff's allegations of sexual misconduct, including the grabbing of his crotch and buttocks on a regular/daily basis over a period of months and years. (PSMF ¶¶ 14-19). Instead, SFG characterizes the behavior as locker-room style antics. Ironically, the Seventh Circuit Court of Appeals has used similar locker room analogies when commenting that a football coach slapping his player's butt on the field does not likely create a hostile working environment, while doing the same to his office co-worker likely does. See *Shepherd*, 168 F.3d at 1008. Mr. Smuk was not a football player, and Mr. Miekisz was not his coach. The behaviors cited above go well beyond horseplay, and the evidence shows that Mr. Miekisz did not routinely treat other employees in similar fashion. (DSMF ¶ 40). Witnesses uniformly testified that no other employee, male or female, complained of harassment by Miekisz. (DSMF ¶ 40).

Defendant's comparisons to *Shafer v. Kal Kan Foods, Inc.*, 417 F.3d 663 (7th Cir. 2005) are unconvincing and serve only to amplify the differences between inappropriate horseplay of the kind described in that case, and what Mr. Smuk endured. The *Shafer* Court indicated that while brief or isolated episodes of sexual misconduct *may* create an environment meeting the standards for hostile workplace sexual harassment under Title VII, more often, frequent, even daily occurrences signify a hostile environment. See *Id.* at 666 (citing *Shepherd*, 168 F.3d at 998; *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008 (7th Cir. 1998); contra *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798 (7th Cir. 2000)). As the *Shafer* Court observed: "[W]hen severe or pervasive conduct creates an objectively hostile or abusive working environment. . . Title VII is implicated." *Id.* at 666.

Mr. Smuk's endurance of regular crotch and buttocks grabbing, and regular comments of a sexual nature, are the sorts of persistent harassment that make a workplace "hostile" under Title VII. See *Timm*, 137 F.3d at 1009 (7th Cir. 2000)(in which the Court of Appeals sustained a jury award of punitive damages for hostile workplace sexual harassment based on plaintiff's allegations of persistent misconduct by her co-worker, including that he, "frequently snuck up from behind her and grabbed or pinched her buttocks. Less frequently [the co-worker] would run his hand up her thighs. Sexual comments and propositions from [the co-worker] were everyday fare, according to [plaintiff], despite her protests."); (PSMF ¶ 16).

The Court must draw its own conclusions about whether the conduct Smuk describes is sufficiently severe or pervasive to support a claim for hostile workplace sexual harassment, considering the evidence in a light most favorable to the Plaintiff. It should consider whether Miekisz's conduct was subjectively severe *or* pervasive, and whether a reasonable person in the Plaintiff's shoes would consider it so. See *Hostetler,* 218 F.3d at 808-809 (explaining that conduct must be either severe or pervasive, though not necessarily both). There is ample precedent for sustaining Smuk's claim based on the sorts of persistent sexual comments and gropings that took place. See *Timm*, 137 F.3d at 1009; *Hostetler*, 218 F.3d at 808-809 ("When the harassment moves beyond the sort of casual contact which (if it were consensual) might be expected between friendly co-workers, and manifests in more intimate, intrusive forms of contact, it becomes increasingly difficult to write the conduct off as a pedestrian annoyance." The proposition that unwelcome physical intrusions do not create a hostile environment "becomes dubious when the conduct at issue involves unwelcome contact with the intimate parts of one's body.").

Plaintiff has provided personal testimony of frequent offensive physical touching of his backside and crotch, carried out on a regular basis over a period of years, and accompanied by threatening, offensive and humiliating comments, usually of a sexual nature. (PSMF ¶¶ 14-19). Plaintiff's claims more than meet the criteria for severe or pervasive sexual misconduct necessary to survive summary judgment, and Defendant's Motion must be denied.

b. Miekisz's Conduct Was Sexual in Nature and Directed at Mr. Smuk Because of His Gender

Defendant's primary argument against the gender-specific nature of his harassment is that Miekisz was an equal-opportunity harasser who made improper comments about women as well as men. Yet Defendant admits that Mr. Miekisz had never been the subject of harassment allegations other than Mr. Smuk's. (DSMF ¶ 40). Further, Miekisz's conduct was of an obvious sexual nature and went beyond the sorts of general nastiness that Defendant argues should defeat a claim for gender-specific sexual harassment under Title VII. Finally, there is evidence that SFG treated complaints from similarly-situated female employees far more seriously than it treated Mr. Smuk's allegations, even where the female employees' allegations were not nearly as severe or persistent. (PSMF ¶¶ 20-21). SFG's HR Director believes that Mr. Smuk was subjected to sexual harassment. (PSMF ¶ 25). The Court should conclude the same for purposes of deciding the Motion.

"There is no singular means of establishing the discriminatory aspect of sexual harassment. So long as the plaintiff demonstrates in some manner that he would not have been treated in the same way had he been a woman, he has proven sex discrimination." *Shepherd*, 168 F.3d at 1009 (citing *Oncale*, 118 S. Ct. at 1002). "In a case alleging same-sex harassment, a plaintiff may show that a harasser is motivated by the plaintiff's sex by showing, for example, that (1) the harasser acted out of sexual desire directed only at members of the same sex, (2) the harasser engaged in the harassment out of hostility for members of the same sex in the workplace, or (3) the harasser treated men and women differently in the workplace." *Hayes v. Exec. Mgmt. Servs., Inc*., 2006 U.S. Dist. LEXIS 47677 at *15 (citing *Shepherd***,** 168 F.3d at 1008-09; *Oncale*, 118 S. Ct. at 1002).

The record is replete with indications that Miekisz's conduct was not intended to just offend, but was overtly sexual in nature. Miekisz repeatedly made comments about Mr. Smuk's "ass" and physical fitness when groping or fondling him from behind. (PSMF ¶¶ 16-17). Mr. Smuk's co-worker's reportedly felt that Miekisz was trying to "fuck" Mr. Smuk. (PSMF ¶ 26). Miekisz became angry and made threats when his improper gropings were rebuffed. (PSMF ¶ 18). Miekisz admitted to having said that he would "fuck" the Plaintiff, then "fuck" his wife. (DSMF ¶ 37; PSMF ¶ 15). Miekisz showed Plaintiff pornographic video clips, and would say "Take a look. Take a look how big does this guy have it. What do you think about that?" [in reference to the male performer's genitals]. (PSMF ¶ 27).

These examples are very similar to those in *Shepherd*, where the Court reversed and remanded the trial court's grant of summary judgment. See *Shepherd*, 168 F.3d at 1009. The *Shepherd* Court concluded that the perpetrator's comments and actions, including that the plaintiff was a "handsome young man," that he might "crawl up on top of [plaintiff] and fuck [him] in the ass," and that "[a] man can come if he's fucked in the ass" created a reasonable inference that the offender's actions were based on gender, thus disposal at the summary judgment stage was improper. *Id*. at 1010. The Court acknowledged that a fact-finder might interpret those actions differently at trial, but concluded that such judgments should be reserved for a fact-finder's decision. *Id*.

Defendant portrays Miekisz as an equal-opportunity harasser of males and females. There is no basis in the record for such an inference. Miekisz denied having ever touched or slapped the butt of a female employee at SFG. (PSMF ¶ 24). The fact that he admitted doing so with Plaintiff satisfies the third prong of the *Shepherd* test – that he treated male and female co-workers differently based on gender. Miekisz did make sexually inappropriate comments about Smuk's wife Ewa, including that she "has boobs like Miekisz's daughter" and that he would fuck her after fucking Plaintiff, but he did not even know her at the time, and nothing in the record indicates that he directed the comments to Ewa Smuk herself. (PSMF ¶ 28; DSMF ¶¶ 37-38).

Defendant can cite no authority for the premise that comments about Smuk's wife intended to offend Smuk himself – the specific target of Miekisz's abuse – render Miekisz an equal-opportunity harasser. Perhaps Miekisz is attracted to both sexes, though he only made significant advances at Mr. Smuk. Perhaps he made comments about Ewa Smuk to upset the Plaintiff, without intending any overt sexual connotation. Neither speculation undermines the basic premise that Smuk was targeted as a male, nor that the vast majority of comments and actions were directed to Smuk himself, and toward his decidedly male features – his backside and his crotch.

This situation is eminently distinguishable from *Holman v. State of Indiana*, in which husband and wife co-plaintiffs brought matching charges of sexual harassment against the same employer, based on the same supervisor's misconduct. *Holman*, 211 F.3d 399, 404 (7th Cir. 2000). The logic of *Holman* was inescapable: when co-plaintiffs, one a man and one a woman, bring charges of gender-based harassment under Title VII, the complaints cannot logically coexist. If the defendant harassed both males and females with equal aplomb, the discrimination cannot have been gender-based. *Id*. By contrast, SFG emphasizes that no one other than Mr. Smuk ever complained about Miekisz or sexual harassment. The most logical explanation for his comments about Ewa Smuk, in light of the entire record, is that he made the comments as part of a regular pattern of abusive conduct. That explanation does not diminish or contradict the clearly-supported premise that Mr. Smuk was treated differently than other SFG employees based on his sex.

Finally, it bears noting that male employees who touched or groped female SFG employees were routinely fired. (PSMF ¶¶ 20-21). Ms. Pagan testified that she was aware of at least two instances in which male SFG employees were fired for improperly touching female employees. In one case, the male employee "smacked" a female employee "on the butt." In the other, a male employee "grabbed" a female employee "from behind and rubbed himself on her." (PSMF ¶¶ 20-21). Those are unquestionably offensive actions, and one can understand why SFG terminated the offending employees. However, when it came to Mr. Smuk's allegations of male-on-male conduct of a far more severe and pervasive nature, Defendant was content to label it horseplay and to abet locker-room style antics from supervisory figures. Given Mr. Miekisz's position in management, he had every reason to know that SFG would tolerate offensive conduct against male employees that it would not tolerate against female employees. Predictably, when SFG faced allegations of male-on male sexual harassment, it downplayed those claims and proceeded in a manner that practically excused the offender, while blaming the victim for (supposedly) not coming forward sooner.

The male-female incidents Pagan described sent a clear message to SFG employees concerning sexual harassment: men such as the Plaintiff were expected to endure unwanted touching, groping and butt-slapping on a regular basis, while women could anticipate that isolated instances of unwelcome touching would result in swift, decisive protective action from management and HR.

The record demonstrates that Mr. Smuk would not have been subjected to sexual harassment were he a female, and shows that if he had been female, his allegations would have been treated far more seriously. The fact-finder should have every opportunity to weigh Miekisz's motivations. See *Shepherd*, 168 F.3d at 1010. The Court should deny summary judgment on the issue of gender-specific harassment.

II. SFG is Liable for Mr. Miekisz's Actions Because He Was Plaintiff's Direct Supervisor and Because it Has Not Established a Sufficient Affirmative Defense Under the *Burlington Industries, Inc. v. Ellerth* Standard

The Defendant conducts a passing summary of the standard for establishing employer liability under *Burlington Industries, Inc. v. Ellerth* that ignores the decision's basic premise. *Burlington* holds that in situations like the present one:

> an employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. A defending employer may raise an affirmative defense . . . [which] comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably

> failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Burlington, 524 U.S. 742, 765 (1998). It is the employer's burden of proof to show, by *clear and convincing evidence*, that it exercised reasonable care to prevent and correct the alleged harassment *and* that the employee failed to protect himself by taking advantage of employee policies designed to correct the behavior. See *Id*. at 765. Defendant cannot satisfy either prong because the Plaintiff reported Miekisz's conduct to Plant Manager Paul Sowizral as far back as 2009, with no obvious result beyond continued harassment.

Both *Shafer* and *Timm*, discussed above, present a contrast with Smuk's situation. The alleged perpetrator in both cases was not the plaintiff's supervisor. In *Shafer* the employer did not obviously ratify the perpetrator's conduct. *Shafer*, 417 F.3d at 665-66. By contrast, Miekisz was Smuk's direct supervisor and a member of the Plant's management team, and his SFG superiors were directly aware of complaints by Mr. Smuk as far back as 2009, but took no significant action. (PSMF ¶ 12). Mr. Smuk reported Miekisz's frequent sexualized behavior to the Plant Manager, Paul Sowizral, which is one of the acceptable forms of making a sexual harassment complaint to management under SFG's sexual harassment policy guidelines. ("Employees believing they have experienced. . . any form of harassment or discrimination, including sexual harassment, must immediately report the matter to your immediate supervisor [In Plaintiff's case, Mr. Miekisz], the location Human Resources Manager [Ms. Pagan] or the location General Manager [Mr. Sowizral].") (PSMF ¶¶ 3-4, 6).

Sowizral further testified that he had an "open-door policy" as plant manager, and that every employee should feel comfortable approaching him with concerns or complaints. (PSMF ¶ 6). The existence of an open-door policy discredits SFG's argument that Mr. Smuk caused or failed to mitigate his own harm by failing to file a formal complaint before 2012. See *Timm*, 137

F.3d at 1009 (describing the defendant's argument that plaintiff failed to file a "formal complaint" as "bizzare" given that the employer maintained an open-door policy and had been advised of the harassment informally).

There are significant disputes of material fact over where Mr. Smuk reported Miekisz's conduct to Sowizral, whether at a coworker's home, in the workplace, or both, and whether the description was of regular sexualized conduct or simple bullying. But both Smuk and Sowizral acknowledge that at least one complaint conversation took place in 2009, and Ms. Pagan believes that Sowizral should have reported the matter to HR. (PSMF ¶ 4). Sowizral testified that he instructed Miekisz to stop "picking-on" Plaintiff, and Plaintiff testified that Mr. Miekisz recounted the warning to him personally, and with contempt for the instruction – saying that he was not afraid of anyone in the office and certainly not Sowizral. (PSMF ¶ 29). According to Mr. Smuk, Sowizral considered it likely that Miekisz was "trying to fuck [Smuk]." (PSMF ¶ 26). Whatever Sowizral said to Miekisz about his treatment of Smuk, the harassing behavior continued unabated for three more years, and SFG took no obvious corrective actions during that time. Plaintiff is the non-movant, and both versions of the 2009 report to Sowizral are premised on simple deposition testimony. For the instant motion, the Court must accept Plaintiff's version of events and conclude that he reported persistent sexual harassment to Sowizral in 2009, without tangible results. See *Bennington*, 275 F.3d at 658.

Even SFG's 2012 investigation was conducted in a fashion that determined the consequences to Mr. Miekisz before obtaining the whole story from Smuk. Mr. Smuk made allegations of sexual harassment on July 5, 2012, at a meeting in Sowizral's office. (DSMF ¶¶ 31-37). Ms. Pagan subsequently interviewed Miekisz and, having accepted his admissions of slapping Plaintiff on the backside in a playful manner and commenting that he would "fuck the

Plaintiff and fuck his wife," she essentially concluded her investigation and recommended a three-day suspension and sensitivity training. On July 23, 2012, she notified Mr. Miekisz of these consequences in writing. (DSMF ¶ 29). On July 31, 2012 she notified Smuk. (DSMF ¶ 46).

Only after conducting her investigation and accepting Miekisz's watered-down version of events did Pagan formally interview Smuk in his native language and accept his written complaint. (DSMF ¶¶ 47-48). She did this not to determine what had happened between Miekisz and Smuk, but to give Smuk a "voice", whatever good that did him. (PSMF ¶ 8). During the interview, Smuk recited a version of events entirely consistent with his allegations in the Complaint – that grabbing of his private parts had gone on frequently since the onset of his employment, that sexual comments accompanied these advances, that he had complained both in and out of the office to Mr. Sowizral, that Miekisz had threatened him and expressed no concern after learning of the Sowizral conversations, and that the behaviors continued all the way into 2012. (PSMF ¶ 9).

Pagan apparently re-interviewed Miekisz after her August 9, 2012 interview with Smuk, but barely raised any of the additional allegations against him, choosing to focus instead on complaints about hours worked, jobs performed, and timekeeping. (PSMF ¶ 30). She did not bother to ask if Miekisz had shared the nature of the investigation with co-workers in a derisive manner, as Smuk had alleged, or if the improper touching he admitted had occurred regularly, or on an isolated basis. *Id*.

Rather unbelievably, Defendant asserts that Pagan did not consider the described behavior sexual harassment. (Mtn. p. 17). At her deposition, Pagan was asked: "So did you consider the actions to which Mr. Miekisz admitted to have been sexual harassment based on the definition you just shared?" She responded: "Could be construed, yes, as sexual harassment" and referred to it as sexual harassment later in the deposition as well: "It's sexual harassment." (PSMF ¶ 25). There is no apparent end to Defendant's soft-pedaling of the issues in this case.

Plaintiff alleges that Miekisz made threatening comments, if not sexual ones, even after SFG's investigation and the suspension. Unsurprisingly, Defendant's brief does not mention those allegations. Defendant is far more concerned with the fact that Mr. Smuk had been trained on sexual harassment policy (which no one denies, though the efficacy of such training may be questioned when the forms stating the policy were not provided to Mr. Smuk in a language he can read), than it is with the fact that Sowizral had received the same training, and virtually ignored Plaintiff's pleas for help. (PSMF ¶¶ 1-5).

Defendant has not put forth clear and convincing evidence that it exercised reasonable care in protecting Mr. Smuk from sexual harassment at the hands of his supervisor, or that he failed to take advantage of those protections. SFG waited three years from the date of first report to take meaningful action of any kind, and basically ignored evidence of more egregious conduct by Miekisz in favor of his less-damning version of events. SFG was on notice of the alleged harassment in 2009. It took no action of any kind until 2012. When it did act, its actions were minimal. Yet it wants to blame Smuk for his longtime harassment. The Court should not accept SFG's version of events for purposes of summary judgment, and the Motion should be denied.

III. Plaintiff Has Presented Sufficient Evidence of Actual Damages, and Summary Judgment May Not Enter on That Basis

The Court should not entertain Defendant's half-hearted argument that Plaintiff fails to allege or present evidence of damages sufficient to sustain his claims. He has provided plenty of evidence that he suffered intense emotional distress throughout the course of his employment as a result of Miekisz's harassment itself, and the consequent embarrassment and shame that followed from the harassment. Miekisz harassed Plaintiff in plain sight of Smuk's work colleagues at times, and at other times advised Smuk's fellow maintenance mechanics that they could blame Smuk for additional work assignments. (PSMF ¶ 13). Miekisz repeatedly chastised Smuk in front of colleagues, with the intention of embarrassing him. (PSMF ¶¶ 13, 31). Though Plaintiff only sought psychological treatment on one occasion, he disclosed the therapist as an expert witness. (Def.'s Ex. F, ¶ 1). Nevertheless, he is entitled to rely on his own testimony as evidence of emotional damages, and that testimony more than meets the standards necessary to avoid summary judgment.

Defendant cites *Denius v. Dunlap*, 330 F.3d 919, 929 (7th Cir. 2003) for the proposition that a plaintiff may not rely on bare allegations of embarrassment or humiliation to sustain a claim for emotional distress damages. *Denius* is not a Title VII case, and its only element in common with the current matter is that both involve a claim for emotional damages. See *Id.*

In *Denius* the plaintiff claimed that he suffered emotional distress in a situation that would not obviously produce such distress – being asked to sign a release form authorizing the discovery and disclosure of information about his background. When he refused to sign the release, he was terminated. *Id.* The form required the disclosure of constitutionally-protected information like medical records. *Id.* Although the firing itself was undoubtedly upsetting, his only testimony about emotional distress was that being asked to sign the form on pain of losing his job caused him emotional distress. The reasons why were not obvious, based on common experience. The Court contrasted that situation with the ones in *Alston v. King*, 231 F.3d 383, 388 (7th Cir. 2000) and *United States v. Balistrieri*, 981 F.2d 916, 931-32 (7th Cir. 1992), where the "facts underlying the case are so inherently degrading that it would be reasonable to infer that a person would suffer emotional distress from the defendant's action." *Denius*, 330 F.3d at 929.

Alston and *Balistrieri* have more in common with this case than *Denius*. In *Alston*, the circumstance of the employee-plaintiff's termination was not itself sufficient to create an inference of emotional distress. *Alston*, 231 F.3d at 388-389. However, the plaintiff's testimony about the experience of termination – that he was physically escorted to his desk and that he suffered humiliation in front of his co-workers, who mocked him while he collected his belongings under supervision, was sufficient to raise a jury issue concerning emotional distress. *Id*. In essence, the *Alston* plaintiff's testimony that he was embarrassed by an understandably embarrassing situation sustained his damages claims on summary judgment. See *Id*. at 389. Mr. Smuk testified that his treatment was the subject of co-worker discussion and his own humiliation on multiple occasions. (PSMF ¶¶ 13, 31).

By contrast, *Balistrieri* presents a situation in which the cause of distress was so obvious that an inference of emotional distress would naturally follow. *Balistrieri*, 981 F.2d 916 (7th Cir. 1992). *Balistrieri* dealt with the emotional damages suffered by so-called "testers" in housing discrimination cases. *Id*. Testers are people employed to root-out housing or other forms of discrimination by posing as prospective renters. They "test" landlords by documenting the difference in how prospective tenants belonging to racial or ethnic minorities are treated versus how Caucasians are treated by the same prospective landlords. Though the actual evidence of the Testers' emotional distress in *Balistrieri* was sparse, amounting to little more than conclusory allegations of sadness and emotional distress, the circumstances were deemed sufficiently egregious that the Court could infer emotional distress. *Id*. at 925.

Some circumstances, including brazen displays of racism, are naturally upsetting, and a party need not provide significant demonstrative evidence to explain how or why. See *Id*. at 932-33. As the *Balistrieri* Court observed:

> [W]e hesitate to base a decision in a specific case on generalities. The jury is in the best position to evaluate both the humiliation inherent in the circumstances and the witness's explanation of his injury. Moreover, the jury is able to examine the witness personally; a jury may glean as much if not more about a witness's emotional state from the witness's demeanor than from his attempts to explain the nature of his injury in words.

Id. at 933. The Testers intended to bear the brunt of racial housing discrimination, yet the Court was content to let a jury determine their emotional damages based on the natural discomfort that the situation created. Being molested and harassed every day at work is also naturally distressing.

Mr. Smuk indicates throughout the pleadings and by way of affidavit that he was extremely distraught by Miekisz's conduct. (PSMF ¶¶ 13, 31). He was embarrassed and sought relief from a trusted supervisor, Paul Sowizral. (PSMF ¶ 12). He did seek the help of a psychologist, and though he was able to maintain a relatively normal life during the period in question, his own resilience in the face of repeated harassment should not doom his case. He specifically testified that "during the period of time when I worked there, other employees would laugh at me, would make fun, would make fun of the situation that resulted from [Miekisz's] actions. . . they would blame me. . . that it was my fault in causing [Miekisz's] attitude. . . I became an object of . . . ridicule at the company." (PSMF ¶ 13, 18, 31).

It is only natural that a person who experiences unwelcome touching and groping by his supervisor on a regular basis would be emotionally distraught. When the touching and harassment are compounded by frequent attempts to single out or embarrass the Plaintiff in front of co-workers, and when at least some of the unwelcome touching itself took place in front of co-workers, the question of emotional distress becomes one for the jury. (PSMF ¶ 31); See also *Balistrieri*, 981 F.2d at 933.

The Court may not properly conclude that Plaintiff did not suffer emotional distress on summary judgment, especially where the circumstances Plaintiff describes are so severe and pervasive that any reasonable person would suffer such distress. There is no formal requirement that a Title VII plaintiff seek psychological treatment or maintain an active therapeutic regimen. Mr. Smuk's testimony on the subject is more than sufficient. Summary Judgment should be denied on the issue of damages.

IV. Plaintiff Has Alleged Retaliation in the Form of Lost Opportunities for a Raise After he Reported Sexual Harassment to Sowizral, and this Court already Concluded that He Had Not Exhausted Administrative Remedies on Such a Claim

The obvious gravamen of Plaintiff's Complaint is hostile workplace sexual harassment, as described above. However, there is also evidence that the Plaintiff was deprived of a raise based on his 2009 report to Paul Sowizral as well as his frequent rejections of Miekisz's sexual harassment. Defendant does not even address this evidence.

Reporting sexual harassment to Sowizral was protected activity under the *McKenzie* test. *McKenzie v. Ill. Dept. of Trans*., 92 F.3d 473, 483 (7th Cir. 1996). Plaintiff testified that he stopped receiving raises during his employment, and that he was specifically denied a raise based on Miekisz's objections in 2012, after his report to Sowizral, and after Miekisz had made numerous threats against him. (PSMF ¶ 32). He also testified that another SFG maintenance mechanic reported obtaining a raise during the same time period in 2012. (PSMF ¶ 32).

As courts have commented, a plaintiff may show retaliation based on suspicious timing of adverse consequences in employment, evidence that similarly-situated individuals were treated better, and evidence that the employer offered a pretextual reason for the employment actions. All are present in the denial of Smuk's raise in 2012. The denial of a raise coincided with multiple reports that Miekisz had sexually harassed Smuk. Miekisz was aware of those allegations. (PSMF ¶ 32). Another person in Plaintiff's position received a raise at the same time Smuk's was denied, and an SFG supervisory employee told Smuk that the raise was denied at

Miekisz's behest. (PSMF ¶ 32). Since the Defendant has not even addressed these allegations set forth in Plaintiff's own deposition, it has essentially waived any objection to the argument based on alternative evidence. Nonetheless, it has proffered no evidence against the claim, and the Court should find that Plaintiff has stated a plausible claim for retaliation.

As for the matter of exhaustion of remedies, the Court has already addressed the issue, and determined that Smuk's agency charge was sufficient to support such a claim. As the Court observed: "SFG's assertion that Smuk's Charge contained no allegations of retaliation is contrary to the Charge on which SFG relies so heavily." (Dkt. 25, p. 4). The Court went on to deny dismissal of the retaliation charge on that basis. Nothing has changed since the Court's order that would warrant reversal of its prior ruling. Plaintiff has offered reasonable evidence of retaliation, and the Defendant has ignored it completely, in an effort to disguise its own omissions. Summary Judgment should be denied on Plaintiff's retaliation claim.

WHEREFORE, Plaintiff prays that this Honorable Court denies Defendant's Motion for Summary Judgment in its entirety, and for any other relief that the Court deems equitable and just.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

The undersigned certifies that on May 23, 2016, he served Plaintiff's MEMORANDUM OF LAW IN RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT THEREOF (CORRECTED) electronically with the United States District Court for the Northern District of Illinois, Eastern Division via the CM/ECF system, which automatically notifies subscribed parties.

/s/ Thomas D. Carroll
Thomas D. Carroll